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No. 91-67

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

CSX TRANSPORTATION, INC.
and
MARLER L. BENNETT,
Petitioners

v.

DAVID E. TILLMAN,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In this case, the district court, on the Friday afternoon before the Monday that trial was to commence and after this matter had been heatedly litigated in federal court for over sixteen months, *sua sponte* revived and granted a previously denied joinder and remand motion about an hour *after* the parties had informed the court that their court-ordered settlement negotiations had failed. This case presents the following questions:

1. Did the Fifth Circuit incorrectly conclude that 28 U.S.C. § 1447(d) and this Court's interpretive jurisprudence preclude review, whether by mandamus or appeal, of a district court's remand order entered under 28 U.S.C. § 1447(e)? *See* Argument I.A, *infra.*

2. Can a district court insulate its joinder/remand order entered under 28 U.S.C. § 1447(e) from review by stating a jurisdictional ground as a pretext for its true basis for entering the order? *See* Argument I.B, *infra.*

3. Is a district court's Section 1447(e) joinder and remand order reviewable where the district court invoked clearly reviewable nonjurisdictional grounds, as well as jurisdictional grounds, as the basis for its order? *See* Argument I.C, *infra.*

4. Does a joinder order entered in conjunction with a remand order under 28 U.S.C. § 1447(e), and entered *sua sponte* by the district court on the last business day before trial intending to destroy its subject matter jurisdiction, constitute a reviewable order under this Court's "collateral order" doctrine of appealability? *See* Argument II, *infra.*

5. Does a district court abuse its discretion in *sua sponte* reviving and granting a previously denied joinder and remand motion on the Friday afternoon before a

scheduled Monday trial, after the parties had announced to the court that the settlement negotiations it had ordered had been unsuccessful? *See* Argument III, *infra.*

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceeding below were petitioners, CSX Transportation, Inc., and Marler L. Bennett (defendants) and David E. Tillman (plaintiff). At the time of its dismissal of this case, the district court, *sua sponte*, resurrected a previously denied motion to join as an additional defendant, the Louisiana Department of Transportation and Development.

Petitioner, CSX Transportation, Inc., certifies pursuant to this Court's Rule 29.1 that its parent company is CSX Corporation and that its subsidiaries and affiliate companies that are not owned are Allegheny and Western Railway Company, The Baltimore and Cumberland Valley Railroad Extension Company, The Central Railroad of South Carolina, The Cincinnati Inter-Terminal Railroad Company, Clearfield and Mahoning Railway Company, The Cleveland Terminal Valley Railroad Company, Dayton and Michigan Railroad Company, The Home Avenue Railroad Company, and RF&P Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, CSX Transportation, Inc. and Marler L. Bennett, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above entitled proceeding on April 11, 1991.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 929 F.2d 1023 and is reprinted in the appendix hereto, p. 1a, *infra.*

The order and reasons of the United States District Court for the Eastern District of Louisiana is unreported and is reprinted in the appendix hereto, p. 18a, *infra.*

JURISDICTION

Respondent, David E. Tillman, a citizen and resident of the State of Mississippi, filed this personal injury action in the Civil District Court for the Parish of Orleans, State of Louisiana, on August 25, 1988. On September 22, 1988, petitioners, CSX Transportation, Inc., a Virginia corporation with its principal place of business in Jacksonville, Florida, and Marler L. Bennett, a citizen and resident of the State of Alabama, removed this action to the United States District Court for the Eastern District of Louisiana. In filing their removal petition pursuant to 28 U.S.C. § 1441 *et seq.*, petitioners invoked the district court's federal diversity jurisdiction, 28 U.S.C. § 1332.

On January 19, 1990, the Friday before the Monday that this case was to be tried and about one hour after the parties had informed the district court that the court-ordered settlement negotiations had failed, the district court *sua sponte* reconsidered and granted respondent's previously denied motion to join the Louisiana Department of Transportation and Development as an additional defendant and to remand the case to the state court. The district court invoked 28 U.S.C. § 1447(e) as the authority for its joint joinder-remand order.

Petitioners timely appealed the district court's order to the United States Court of Appeals for the Fifth Circuit. Additionally, petitioners filed a petition for a writ of mandamus with the Court of Appeals. The Court of Appeals recognized that the joinder did not destroy federal jurisdiction but dismissed petitioners' appeal and denied the petition for writ of mandamus in an opinion and order entered on April 11, 1991. Appendix, 1a, *infra.*

Petitioners now invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1) by filing this petition within the 90-day time period provided by 28 U.S.C. § 2101(c) and Sup. Ct. R. 13.1.

STATUTES INVOLVED

The following statutes and rules of civil procedure are implicated in this case: (1) 28 U.S.C. § 1332; (2) 28 U.S.C. § 1441(a), (3) 28 U.S.C. § 1447(c), (d), and (e); and (4) Fed. R. Civ. P. 15(a). The full text of these provisions is set forth in the Appendix, *infra*, p. 23.

STATEMENT OF THE CASE

A. Preface

On Friday, January 19, 1990, *i.e.*, on the last business day before this case was to go to trial, the district court, on its own motion, revived and granted a motion to add an additional party and to remand this removed case to state court. At the time this motion was granted, this case had been bitterly contested in federal court for sixteen months. Only a few weeks earlier, the district court had denied *the very same motion*, concluding that it was grossly and inexcusably dilatory and would result in substantial prejudice to petitioners. However, on Friday, January 19, when the parties informed the district court that they could not settle the case in court-ordered settlement negotiations, the court revived and granted the motion and remanded the case. Subsequently, the Fifth Circuit concluded that the district court's joinder/remand order was unreviewable.

This case involves several important questions of federal procedure which should be addressed by this Court. The questions presented herein are substantial and important not only to this case but to the law generally. Among other issues, this case questions whether a joint joinder/remand order entered under 28 U.S.C. § 1447(e) is reviewable, whether a district court can state a jurisdictional basis as a pretext to insulate its remand order from review, and whether a district court abuses its discretion when it enters a joinder/remand order as a sanction, on the eve of trial, with the intent of destroying its subject matter jurisdiction. Petitioners submit that the questions presented herein merit granting a writ in this case.

B. The District Court Proceedings

On August 29, 1988, respondent David E. Tillman, a citizen and resident of the State of Mississippi, filed suit against petitioners in the Civil District Court for the Parish of Orleans, State of Louisiana. Respondent alleged that petitioner CSX, as the owner of a train, and petitioner Bennett, as the engineer of the train, were responsible to respondent for damages that resulted when petitioners' train collided with a tractor/trailer rig driven by respondent at a railroad grade crossing in New Orleans, Louisiana. On September 22, 1988, petitioners CSX (a Virginia corporation with its principal place of business in Florida) and Marler L. Bennett (a citizen and resident of the State of Alabama) removed the case to the United States District Court for the Eastern District of Louisiana, invoking the court's diversity jurisdiction.

The case proceeded in the federal district court for the next sixteen months. During this time period, the parties heatedly litigated this case. The district court record, consisting of over 180 entries at the time of the district court's remand, chronicles the intensity of this litigation. During this time, respondent amended his complaint to add a punitive damage claim; the district court subsequently granted petitioners' summary judgment motion dismissing this claim. Various other claims and motions were litigated and decided. Additionally, the parties engaged in substantial discovery (which, pursuant to the district court's local rules, is not included in the record), including the propounding and answering of several sets of interrogatories and the taking of at least nineteen discovery depositions. Several protective orders were sought and issued.

The district court originally docketed this case for trial on June 5, 1989. However, on respondent's motion, and over petitioners' objection, the district court continued the trial until January 22, 1990.

On October 4, 1989, less than four months before the January 1990 trial date and after pleading amendment cut-off dates had passed, respondent filed a motion seeking to add the Louisiana Department of Transportation and Development ("DOTD") as a party defendant. Respondent joined this motion with a motion to remand the case to state court. On November 2, 1989, the district court denied the motion. Appendix, 13a, *infra*. The district court reasoned that the DOTD was not an indispensable party, that respondent was grossly and inexcusably dilatory in seeking the amendment, and that petitioners would be prejudiced by the amendment. *Id.* at 15a. Subsequently, on December 5, 1989, the district court denied respondent's motion to reconsider his joinder/remand motion. Appendix, 17a, infra.

The case proceeded toward trial. On January 10, 1990, the district court held a pretrial conference, during which the trial judge reiterated that the DOTD was not an indispensable party and that the court would try the case with the DOTD as an "empty chair" in accordance with the court's procedure in such cases.

Less than one week before the January 22, 1990, trial date, during court-ordered settlement discussions, the court informed the parties for the first time that it was considering adding the DOTD as a party and remanding the case back to state court. With the assistance of a federal magistrate, settlement discussions continued throughout the week before trial. With trial before a jury scheduled to commence on Monday, January 22, 1990, counsel for petitioners telephoned the federal magistrate on Friday, January 19, 1990, at approximately 2:30 p.m. and informed the court that the parties were unable to settle the case. About one hour later, the district judge held a telephone conference with counsel. During this conference, the district court, *on its own motion*, resurrected respondent's previously denied joinder/remand motion. The court then granted the motion and remanded the case.

On January 22, 1990, the date that trial was to have commenced, the district court memorialized its telephone conference ruling with a written minute entry order. *See* Appendix 18a, *supra*. In this order, the district court invoked 28 U.S.C. § 1447(e) as its basis for granting the joinder and remanding the case. The court believed (erroneously) that by adding the DOTD, a state sovereign defendant, it had destroyed its subject matter jurisdiction and had provided a basis for remanding the case. *Id.* The court stated in its order that joinder of the DOTD was appropriate, because the purpose of the proposed amendment was not to defeat federal jurisdiction and because respondent had a valid cause of action against the DOTD. *Id.* at 19a. It revoked its previous order denying this motion and ruled that justice militated in favor of trying the entire action before a single fact finder. *Id.* Petitioners moved the district court to reconsider its order, but the district court refused.

C. Proceedings Before the Fifth Circuit

Petitioners timely filed notices of appeal. Additionally, petitioners invoked the mandamus jurisdiction of the Court of Appeals. On April 11, 1991, the Court of Appeals issued a written decision and order dismissing petitioners' appeal and denying their petition for writ of mandamus.

The Fifth Circuit found that the case clearly was within the district court's diversity jurisdiction, as plaintiff Tillman was a Mississippi resident and defendants CSX and Bennett were, respectively, Florida and Alabama residents. Appendix 2a, *infra*. It recognized that the district court "resuscitated" respondent's joinder/remand motion when the parties announced that they were unable to settle the case, believing that the Eleventh Amendment immunity of the DOTD destroyed its subject matter jurisdiction. *Id.* at 3a-4a.

The appellate court acknowledged the district court's stated reasons for remanding: (1) that the entire case should be tried by a single forum, and (2) that the district court believed the DOTD had Eleventh Amendment immunity and its joinder had destroyed its subject matter jurisdiction. *Id.* at 4a. It then analyzed whether it had authority to review the remand order. The appellate court reiterated this Court's holding in *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), that only remand orders *not* based on 28 U.S.C. § 1447(c) were reviewable. *Id.* at 7a. While the appellate court acknowledged that the district court had not expressly invoked Section 1447(c), it nevertheless concluded that the district court's second reason for remand, although incorrect,[1] was within the scope of Section 1447(c), thus precluding review of the remand order. *Id.* at 8a-9a. It found that the district court's inclusion of an additional, non-1447(c) ground for remand (reason No. 1, above) did not make the remand order reviewable. *Id.* at 9a-10a. The appellate court refused to address petitioners' argument that this remand order, expressly based on Section 1447(*e*) and not Section 1447(*c*), was reviewable under *Thermtron*.

The Court of Appeal next held the district court's joinder order to be a nonreviewable interlocutory order. *Id.* at 10a. Considering the joinder portion of the order separate from the remand portion of the order, the court reasoned that it did not have the requisite finality to be reviewed under the "collateral order" doctrine of appealability. The court concluded that the case was still ongoing in federal court at the moment of the joinder order (which the appellate court technically found to precede the remand order), and the addition of DOTD did not

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[1] While the Fifth Circuit held the remand order unreviewable, it concluded that the district court had erroneously found that the joinder of the DOTD had destroyed its subject matter jurisdiction, as a sovereign entity's Eleventh Amendment immunity does not destroy subject matter jurisdiction. *Id.* at 8a-9a.

destroy diversity. Consequently, the court reasoned that the joinder order was an unreviewable interlocutory order, and not a reviewable collateral order. *Id.* at 10a.

Finally, while finding that it had no authority to review the correctness of the joinder order, the Fifth Circuit opined that the district court did not abuse its discretion. *Id.* at 11a-12a. Ignoring the fact that the district court, and not the respondent, resurrected the motion for the purpose of destroying its subject matter jurisdiction, the appellate court reasoned that the principal purpose of respondent's amendment was not to defeat federal jurisdiction because respondent had a valid cause of action against DOTD. *Id.* It further reiterated the district court suggestion that the case should be tried before one fact finder. *Id.*

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S RULING THAT THE DISTRICT COURT'S JOINDER/REMAND ORDER IS UNREVIEWABLE CONFLICTS WITH THIS COURT'S JURISPRUDENCE

A. The district court's joinder/remand order, expressly grounded in 28 U.S.C. § 1447(e), is outside the scope of orders unreviewable under 28 U.S.C. § 1447(c)

Title 28 U.S.C., Section 1447, quoted at 23a, *infra*, provides the grounds and procedure for remanding a removed case to state court. Section 1447(c) authorizes the district court to remand a case any time before final judgment where the district court lacks subject matter jurisdiction. Section 1447(d) states that an order remanding a case to the state court from which it came is not reviewable by appeal or otherwise. Section 1447(e), added in 1988, provides that when a plaintiff seeks to join additional defendants that would destroy subject matter jurisdiction, the court may deny the joinder or allow joinder and remand the case to the state court.

In this case, the district court expressly relied on Section 1447(e) in *sua sponte* reviving and granting respondent's previously denied joinder/remand motion:

> Since Plaintiff's proposed amendment would destroy subject matter jurisdiction in this court, the joinder is governed by 28 U.S.C.A. § 1447(e) . . . .

Appendix, 18a, *infra.* Petitioners expressly argued to the Court of Appeals that it had jurisdiction to consider the appropriateness of the remand order, since the district court expressly based its joinder/remand order on Section 1447(e). However, the Court of Appeals refused to address whether a Section 1447(e) order is reviewable.

While this Court has not expressly addressed this issue, its jurisprudence suggests that Section 1447(e) orders are reviewable. In *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), the district court remanded a case over which it had jurisdiction because it had no time to try the case. *Id.* at 339. This Court concluded that only remand orders issued under Section 1447(c) *and* invoking the grounds in that provision were shielded from review under Section 1447(d). *Id.*, 423 U.S. at 346. Under Subsection (c), as it existed at that time, remand was appropriate only where the removal was "improvident or without jurisdiction."[2] The Court found that the district court's crowded docket did not constitute a permissible ground for remand under Section 1447(c). Therefore, the Court of Appeals had mandamus jurisdiction to review the order.

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[2] Subsection (c) was amended in 1988 as part of the Judicial Improvements and Access to Justice Act, Pub. L. No. 702, 100th Cong., 2nd Sess., § 1016; 102 Stat. 4642, 4670. The present text of the subsection is as quoted in the Appendix, p. 23a, *infra.* Before the 1988 amendment, the section provided for remand where removal was "improvident and without jurisdiction." For purposes of this case, the amendment to Subsection (c) makes no difference, as both before and after the amendment, remand is required where the district court lacks subject matter jurisdiction.

Subsequently, the Court addressed the reviewability of remand orders in *Gravitt v. Southwestern Bell Telephone Co.*, 430 U.S. 723 (1977). There, the district court made a good faith, but erroneous, decision that it had no diversity jurisdiction and remanded the case to the state court. *Gravitt v. Southwestern Bell Telephone Co.*, 416 F. Supp. 830, 831-32 (W.D. Tex. 1976). The *Gravitt* district court had earlier expressly rejected a suggestion that it should remand the case for lack of jurisdiction, even if it had jurisdiction, because such a remand would not be reviewable. *Gravitt v. Southwestern Bell Telephone Co.*, 396 F. Supp. 948, 951 n.1 (W.D. Tex. 1975). The Fifth Circuit found the district court's remand order reviewable under *Thermtron* and issued a writ of mandamus and vacated the remand order. *In re Southwestern Bell Telephone Co.*, 535 F.2d 859 (panel decision), 542 F.2d 297 (5th Cir. 1976) (*en banc*). This Court reversed, concluding that the district court's order, though possibly erroneous, was within the scope of Section 1447(c) and unreviewable. *Id.*

The clear mandate of *Thermtron* and *Gravitt* is that mandamus review of remand orders is allowed except when the district court's order is based on Section 1447(c). Furthermore, with very limited exceptions, remand orders that are outside the scope of Section 1447(c) should be vacated. Consistent with these principles, Courts of Appeals regularly have reviewed remand orders that are outside the scope of Section 1447(c). *E.g.*, *In re Ben Carter*, 618 F.2d 1093 (5th Cir. 1980), *cert. denied sub nom., Sheet Metal Workers International Association v. Carter*, 450 U.S. 949 (1981) (review of remand after entry of final judgment is reviewable); *J.O. v. Alton Community Unit School District 11*, 909 F.2d 267 (7th Cir. 1990) (Section 1447(d) does not preclude review of orders remanding pendent state claims); *Sheet Metal Workers International Association, AFL-CIO v. Seay*, 696 F.2d 780 (10th Cir. 1983) (review of remand order not barred where case was remanded because state court could

provide a more adequate remedy); *In re Federal Savings and Loan Insurance Corp.*, 837 F.2d 432 (11th Cir. 1988) (Section 1447(d) has no application to, and thus does not bar review of, remand orders in cases removed under a statute other than 28 U.S.C. § 1441(a)).

The Fifth Circuit's opinion to the contrary, the district court's subsection (e) joinder/remand order is outside the scope of Section 1447(c). When Congress added Subsection (e) in 1988, it expressly removed from Subsection (c) jurisdictional remand orders based on the district court's own action in joining a party that destroyed subject matter jurisdiction. Furthermore, Congress did not amend Subsection (d), which only prohibits review of Subsection (c) remand orders. *Thermtron, supra.* This Court has held that Congress is presumed to be aware of the law, including the judicial interpretations of its statutes. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988); *Director, Office of Workers' Compensation Programs, United States Department of Labor v. Perini North River Associates*, 459 U.S. 297, 319-20 (1983). Thus, Congress is presumed to be aware of the *Thermtron* rule of reviewability of all but Section 1447(c) remand orders at the time it enacted Subsection (e) without amending Subsection (d). Hence, Congress, in adding Subsection (e) and in taking remand orders within that new section outside the scope of Subsection (c), cannot be said to have made Subsection (e) remand orders nonreviewable. *Goodyear, supra; Perini, supra.*

Furthermore, notwithstanding the Fifth Circuit's decision, a Section 1447(e) joinder/remand order is distinguishable from and outside the scope of Section 1447 (c). Subsection (c) contemplates remand where there is no subject matter jurisdiction given the posture of the case before the district court. Subsection (e), however, grants the district court express authority to destroy its existing jurisdiction by adding an additional party. Congress made a conscious decision to segregate such joint

joinder/remand orders from pure remand orders covered by Section 1447(c). Subsection (e) orders are reviewable, because Congress intentionally segregated such orders from the scope of Subsection (c) without expressly amending Subsection (d) to preclude their review under *Thermtron.*

This case provides an example of how Subsection (e) can be misused. The district court initially denied respondent's joinder/remand motion, finding that respondent was grossly and inexcusably dilatory in making the motion and that petitioners would be substantially prejudiced by the amendment. Appendix, 13a-15a, *infra.* On the last business day before trial, after the parties told the district judge that they could not settle the case in court-ordered settlement negotiations, the district court *sua sponte* revived respondent's motion, granted the joinder, and remanded the case. Appendix, 20a-21a, *infra.* In effect, the district court used the Subsection (e) joinder/remand procedure to penalize the parties for not settling the case.

Whether Section 1447(e) orders are reviewable, and how they are reviewable, present important questions of federal civil procedure that this Court should address.[3] Congress has evidenced no intent to preclude review of joint joinder/remand orders entered under Subsection (e). Absent express action of Congress, the courts should not judicially preclude such review. Petitioners submit that this issue presents an important question of

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[3] Because remand orders are reviewable by writ of mandamus, *see* Arguments I.A, I.B, and I.C herein, and because the joinder order in this case should be considered a collateral order reviewable by appeal, *see* Argument II, *supra*, and because a Section 1447(e) decree contains both a joinder order and a remand order, petitioners sought both a writ of mandamus and appellate review from the Fifth Circuit. Petitioners submit that Section 1447(e) orders should be reviewable, whether by mandamus, by appeal, or by a combination of mandamus and appeal.

federal civil procedure meriting the grant of a writ of certiorari.

B. The district court's pretextual jurisdictional basis for remand should not insulate its order from review under *Thermtron*

This case squarely presents the question whether the district court can immunize its remand order from review by interposing a jurisdictional basis for its true motive in remanding the case. Petitioners submit that the Section 1447(e) joinder/remand order should be reviewed as a single, integrated order. However, regardless whether Subsection (e) joinder/remand orders are reviewable as such, the district court's remand order in this case should be reviewable under this Court's *Thermtron* decision.

Admittedly, the district court's minute entry order of January 19, 1990, *states* a jurisdictional reason as one of two bases for its actions in remanding this case. However, the chronology of the case clearly demonstrates the *real* reason for the remand: the parties had not settled the case in court-ordered settlement negotiations. Respondent filed his joinder/remand motion in October 1989. The district court first considered and rejected this motion on November 1, 1989, chastising respondent for being grossly and inexcusably dilatory in filing the motion. Appendix, 13a-15a, *infra*. The district court further found that, with the trial less than three months away and with the discovery cut-off date only about a month away, petitioners would have been severely prejudiced by allowing the joinder. *Id.* Furthermore, the court stated that it believed that granting the motion would prejudice petitioners by requiring it to remand the case. *Id.* Twenty-nine days later, on November 30, 1989, the district court again reiterated this position by denying respondent's motion to reconsider his joinder/remand motion. Appendix, 17a, *infra*. On January 10, 1990, less than two weeks before trial, the trial judge

stated at a pretrial conference that trying the case with the DOTD as an "empty chair" defendant presented no problem. On Friday, January 19, 1990—only nine days later and on the afternoon of the last business day before the Monday, January 22, 1990, trial date—the district court, without any suggestion by any party, revived and granted the previously denied motion. Appendix, 20a-21a, *infra*. The district court's actions came about an hour *after* the parties had informed the court that they had been unable to settle the case in court-ordered settlement negotiations. Thus, petitioners and respondent, after heatedly litigating this case in federal court for over sixteen months, were remanded to state court on the eve of the federal trial for failing to settle the case.

In *Thermtron*, this Court held that "only remand orders issued under § 1447(c) and invoking the grounds specified therein . . . are immune from review under § 1447(d)." *Id.*, 423 U.S. at 346. The Court also held that district courts exceed their authority in remanding on grounds not permitted by statute. *Id.* at 345, 348, 351. In *Gravitt*, this Court held that a remand order entered under Section 1447(c) was not reviewable, even though the district court's conclusion that it had no jurisdiction was erroneous. *Id.*, 430 U.S. at 723-24. However, *Gravitt*, unlike the present case, did not involve jurisdictional grounds interposed as a pretext for remanding the case. The *Gravitt* district court expressly rejected a suggestion made by plaintiff that it should remand the case for lack of jurisdiction, even if there existed jurisdiction, because a jurisdictional remand would be unreviewable. 396 F.Supp. at 951 n.1 and accompanying text. It remanded the case only after information was brought to its attention leading it to believe that its original finding of diversity jurisdiction was incorrect. 416 F.2d at 831. Unlike the present case, the *Gravitt* district court took no actions designed to destroy its jurisdiction. Furthermore, unlike the present case, the remand order was not entered on the eve

of trial. *See* 416 F.Supp. at 831. Rather, the district court's opinions in that case plainly indicate that the court entered its remand order because it truly believed it lacked subject matter jurisdiction. *See* 416 F.Supp. 830, 831-32; 396 F.Supp. 948, 950-51 and n.1. Thus, *Gravitt* precludes review of a jurisdictional remand order based on the district court's *good faith* determination that it lacks jurisdiction; it does not preclude remand where the stated jurisdictional ground is a clear pretext for an otherwise improper remand.

Following *Thermtron* and *Gravitt*, the Courts of Appeals have held reviewable various non-1447(c) grounds similar to the underlying basis for remand in this case. In *Levy v. Weissman*, 671 F.2d 766, 769 (3d Cir. 1982), the Third Circuit held reviewable a district court's order that remanded a case as a sanction for failing to comply with the court's local rules. In *Sheet Metal Workers International, AFL-CIO v. Seay*, 696 F.2d 780, 782-83 (10th Cir. 1983), the Tenth Circuit held reviewable a remand order entered because the district court believed the state court to be a more equitable forum. In *Nasuti v. Scannell*, 906 F.2d 802, 808-11 (1st Cir. 1990), the First Circuit held reviewable a district court's order based on jurisdictional grounds where the district court's remand order undermined a federal immunity statute.

The Fifth Circuit has recognized the abuses that can result where review is dependent on the words used by the district court rather than on the true basis of its actions. *Sykes v. Texas Air Corp.*, 834 F.2d 488, 492 and n.15 (5th Cir. 1987). In commenting on *Thermtron*, that court stated:

> As Justice Rehnquist suggested in dissent, after *Thermtron* reviewability of § 1447 remands turns on what the district court *says* it is doing. If the court *says* it is remanding for lack of jurisdiction, the decision—even if flagrantly wrong—is completely unreviewable. If the court *says* something else, review

> is available. In other words, reviewability turns on incantation, and the district court has absolute discretion to permit or deny review of its order . . . . Rules of appellate jurisdiction that turn solely on the district court's recitations of formulae make little sense, and we would not add a new one even were we free to do so.

Sykes, 834 F.2d at 492 (footnotes omitted; emphasis in original). The court further explained in a footnote that while it was not suggesting "that federal district courts are prone to manipulate legal doctrine," the question was "whether rules of appellate jurisdiction that give *incentives* for manipulation are wise, particularly when there seems to be no corresponding benefit other than the fact of review itself." *Id.* at 492 n.15 (emphasis in original).

Clearly, this remand order would be reviewable had the district court not interposed a jurisdictional ground for the true basis for its order. Whether or not the remand portion of the district court's order is reviewable independently or as part of a Section 1447(e) joinder/remand order, the Court's assertion of a jurisdictional ground should not preclude review in cases like this case, where the record clearly discloses the district court's true intent. This Court should grant a writ to consider whether a district court can immunize an otherwise reviewable remand order from review by interposing a jurisdictional ground as a pretense.

C. The district court's remand order states nonjurisdictional grounds that are reviewable under *Thermtron*

Additionally, this case presents the question whether review of a remand order is precluded by Section 1441(d) when the district court states a nonstatutory ground for remand in addition to its jurisdictional ground. In this case, the district court, before it stated that it was remanding the case for lack of subject matter jurisdiction, reasoned that remand was appropriate because it

believed that the case should be tried by one fact finder. Appendix, 20a, *infra*. The court apparently reasoned that the Louisiana Department of Transportation and Development, an instrumentality of the State of Louisiana, could not be sued in federal court, thus the case should be remanded to state courts, where all defendants could be sued. *Id.* The Fifth Circuit acknowledged the district court's statement of a reviewable, nonstatutory ground, but opined that the addition of the jurisdictional ground "cloaks the remand order in the § 1447(c) absolute immunity from review." 929 F.2d at 1028; Appendix 9a-10a, *infra*.

Under *Thermtron*, the district court's belief that the case should be tried before one fact finder does not state a Section 1447(c) ground for remand upon which review is precluded. *See Sheet Metal Workers International*, *supra*, 696 F.2d at 782-83 (holding reviewable under *Thermtron* a remand order based on the district court belief that the state court was a more equitable forum). This Court has not addressed the question whether a remand order stating both reviewable and nonreviewable grounds for remand is reviewable. The Fifth Circuit cited no authority supporting its holding in this regard. Petitioners submit that the Court should grant a writ to consider this issue.

II. THE FIFTH CIRCUIT'S RULING THAT THE DISTRICT COURT'S JOINDER ORDER IS AN UNREVIEWABLE INTERLOCUTORY ORDER CONFLICTS WITH THIS COURT'S "COLLATERAL ORDER DOCTRINE" JURISPRUDENCE

For the reasons advanced above, petitioners submit that the district court's entire Section 1447(e) joinder/remand order should be reviewable together as a single judicial order. However, should this Court believe, as the Fifth Circuit found, that reviewability of the joinder and remand elements of the district court's order are separable, the Court also should grant a writ to consider

whether the joinder elements of the district court's order are reviewable under the "collateral order" doctrine of appealability announced in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), and subsequent jurisprudence.

Ordinarily, only final judgments and statutorily defined interlocutory judgments are appealable of right. However, this Court announced in *Cohen* that some orders made during the course of the case that "finally determine claims of right separable from, and collateral to, rights asserted in the action, [are] too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. In subsequent cases, this Court defined the elements of a district court order appealable under the *Cohen* doctrine:

> To come within the "small class" of decisions excepted from the final-judgment rule by *Cohen*, the order must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.

Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978); *see also Gulfstream Aerospace v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 522 (1988); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430 (1985).

In this case, as discussed above, the district court joined the DOTD as part of a Section 1447(e) joinder/remand order intended by the court to destroy its subject matter jurisdiction over the case. Appendix 18a, *infra.* Nevertheless, the Fifth Circuit considered the reviewability of the joinder part of the order separately. In so doing, the Fifth Circuit refused to consider the posture of the case and the district court's plain purpose and intent in entering the order. Reviewing the order in this isolated context, the Fifth Circuit concluded that the

joinder order was unreviewable under the *Cohen* doctrine. *Id.* at 5a, 10a.

Petitioners agree that a joinder order *ordinarily* is a non-appealable interlocutory order. However, as this Court's jurisprudence clearly implies, and as other appellate cases have concluded, the appealability of such orders under the *Cohen* doctrine depends on the effect of the order and the context of the case in which it is issued. *See Katz v. Realty Equities Corp. of New York*, 521 F.2d 1354, 1357-58 (2d Cir. 1975) and *Garber v. Randell*, 477 F.2d 711, 715-16 (2d Cir. 1973) (both cases holding consolidation orders appealable under *Cohen* where the effect of the orders may have resulted in denying parties their due process rights and causing irreparable injury).

Considered in the context of the case at the time it was entered, the joinder portion of the district court's order meets all three *Cohen* requirements. First, in ordering joinder and remand in the same order, the district court conclusively determined the question of joinder in a fashion such that it could not be considered again. Second, the order resolved an important procedural question completely separate from the merits of the action. It determined the scope of the litigation and, in the district court's mind, the right of petitioners to trial in federal court. Third, the order is unreviewable on appeal from a final judgment. While joinder orders often can be reviewed on appeal, when joined with a jurisdictional remand order, appeal is effectively precluded.

In the event that the district court's joinder/remand order is not reviewable as a single Section 1447(e) order, this Court should grant a writ to consider the appealability of the joinder portion of the order under the *Cohen* collateral order doctrine.

III. THE FIFTH CIRCUIT'S SUGGESTION THAT NO ABUSE OF DISCRETION RESULTED FROM THE DISTRICT COURT'S EVE OF TRIAL JOINDER AND REMAND ORDER CONFLICTS WITH THE JURISPRUDENCE OF THIS COURT AND OTHER FEDERAL CIRCUITS

While holding that it had no "collateral order" jurisdiction to review the district court's joinder order, the Fifth Circuit nevertheless opined that the district court acted within its discretion in entering the order. Appendix, 11a, *infra*. The Court of Appeals analyzed the district court's order under Fed.R.Civ.P. 15(a) and found that since respondent had a valid cause of action against the Louisiana Department of Transportation, the principal purpose of the amendment was not to defeat federal jurisdiction." *Id.* It concluded that the district court's finding that justice favored trying the case before one fact finder was not an abuse of discretion. *Id.* However, the Court of Appeals ignored the district court's previous denial of this same motion only a few weeks before. *See* Appendix, 13a, *infra*. It also ignored the fact that the district court, and not the parties, resurrected and granted this motion on the afternoon of the last business day before trial, only *an hour after* the parties had informed the court that the court-ordered settlement negotiations had failed.

Whether reviewable via mandamus or as a "collateral order," the Fifth Circuit's joinder ruling conflicts with rulings of this Court, other circuit court rulings, and the prior ruling of the district court, thus presenting an important question meriting the grant of a writ. Initially, the Fifth Circuit erred in reviewing the appropriateness of the joinder under Fed.R.Civ.P. 15(a), rather than as part of a Section 1447(e) joinder/remand order as it was entered by the district court. However, assuming that the Fifth Circuit correctly analyzed the joinder portion order piecemeal under Rule 15(a), its ruling still presents an important question for review.

This Court last addressed Rule 15(a) in *Foman v. Davis*, 371 U.S. 178 (1962). This Court declared that the liberal purpose of the rule favored allowing amendments to complaints in most cases. *Id.* at 182. The district court's decision is reviewable for abuse of discretion. *Id.* However, this Court also listed several circumstances whereunder the motion should be denied, including, "*undue delay*, bad faith or *dilatory motive* on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, *undue prejudice* to the opposing party by virtue of allowance of the amendment, [and] futility of the amendment." *Id.* (emphasis supplied).

Consistent with *Foman*, the circuit courts have held that review of an amendment must be considered in the posture and context of the case at the time the trial court allows the amendment. *Beeck v. Aquaslide 'N' Dive Corp.*, 562 F.2d 537, 540 (8th Cir. 1977). Furthermore, last minute amendments that result in prejudice should not be allowed. *See Keeler v. Hewitt*, 697 F.2d 8, 14 (1st Cir. 1982) (proposed "eleventh hour" amendment of a malicious prosecution claim denied); *Murphy v. White Hen Pantry Co.*, 691 F.2d 350, 353-54 (7th Cir. 1982) (proposed amendment to add a new claim made six weeks before trial denied, as the motion came after discovery had been completed and after the matter had been in litigation for two years); *Lopez v. General Motors Corp.*, 697 F.2d 1328, 1332 (9th Cir. 1983) (motion to add additional parties four days before consideration of a motion for summary judgment was properly denied).

Contrary to Section 1447(e), Rule 15(a), and the jurisprudence, the judgment and opinion of the Fifth Circuit greatly expands the already broad abuse of discretion standard. The ruling below authorizes the appellate courts to review joinder orders without considering the context of the case and the circumstances under which the order was issued. It promotes the use of joinder and remand procedures as a sanction, contrary to the intent of Section

1447(e) and Rule 15(a). It advances the waste of judicial resources. The decision below authorizes district courts to grant eve-of-trial motions that destroy their jurisdiction, thereby subjecting the petitioners to wasteful and duplicative relitigation efforts (*i.e.*, further discovery, relitigating motions that had previously been considered and denied, and reassertion of claims that had been denied) on remand to the state court. The ruling below further promotes the waste of judicial resources by encouraging district courts to reconsider, *without any party asking for reconsideration*, nonessential motions that had been previously considered and denied.

The questions presented are clearly substantial and important. Petitioners submit that this Court should grant a writ of certiorari to consider the correctness of the Fifth Circuit's opinion and judgment.

CONCLUSION

Petitioners submit that this case presents several substantial questions meriting review. For the reasons discussed above, petitioners submit that this Court should grant a writ of certiorari.

Respectfully submitted,

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July 8, 1991

APPENDIX

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 90-3146

DAVID E. TILLMAN,
Plaintiff-Appellee,
v.

CSX TRANSPORTATION, INC.
& MARLER L. BENNETT,
Defendant-Appellants.

Appeals from the United States District Court
for the Eastern District of Louisiana

(April 11, 1991)

BEFORE BROWN, POLITZ and JOHNSON, Circuit Judges.

JOHN R. BROWN, Circuit Judge:

This case requires us to determine whether the trial court abused its discretion in allowing the addition of a party that it determined would destroy its jurisdiction and then remanding the case back to state court. Reaching the most crucial conclusion first, we hold that by remand to state court, this case lies irretrievably in state court, despite, as the basis for remand, the trial court's

mistaken belief that it no longer had jurisdiction. The trial court brought its remand order within the absolute immunity from review of 28 U.S.C. § 1447(c) by expressly referring to a lack of jurisdiction as one of the bases of its decision to remand.

Through appeal under 28 U.S.C. § 1291, and a petition for a writ of mandamus, CSX Transportation, Inc. (CSX) and Marler Bennett seek review of both parts of the district court's order which (i) allowed the amendment adding the Louisiana Department of Transportation and Development (DOTD), and (ii) remanded the case to state court. As for the propriety of allowing the amendment, we hold that this part of the order did not terminate federal jurisdiction and was therefore an interlocutory, nonappealable order. With regard to the trial court's decision to remand, although the trial court did not mention § 1447(c) by name, the court did cite the destruction of its jurisdiction as one of its grounds for remand. With the order resting on the trial court's belief that it lacked jurisdiction, the case is irretrievably in state court.

An Unwanted Addition

Near New Orleans, on November 17, 1987, a train owned and operated by CSX with Bennett, the engineer, at the controls struck a tractor/trailer rig driven by David Tillman. There was immediate, complete, thorough diversity jurisdiction from the outset. Tillman, a Mississippi resident, brought suit in Louisiana state court against CSX, a Florida resident, and Bennett, an Alabama resident. CSX and Bennett then properly removed the case to the Eastern District of Louisiana on the basis of diversity.

Soon after removal, Tillman filed for a continuance of the original trial date. The trial court relented, pushing the trial date back to January 22, 1990, with a cutoff date for amendments to pleadings of June 9, 1989.

Four months after this deadline for amendments had passed, Tillman moved to file an amended complaint to add the DOTD as a defendant. In addition, Tillman included a motion to remand to state court. The trial court denied this first attempt to amend, stating that the DOTD was not an indispensable party, Tillman was grossly and inexcusably dilatory, and the defendants would be substantially prejudiced by the amendment.

This denial, however, did not sound the death knell for Tillman's motions. Less than one week before trial, in the course of court-ordered settlement discussions, the trial court informed the defendants that it was considering adding the DOTD as a party defendant and remanding the action back to state court. When court-ordered settlement discussions failed, the trial court fully resuscitated Tillman's motions for leave to amend and for remand. On the eve of trial, the trial court allowed the joinder of the DOTD as a party defendant. Turning to what it considered to be the concomitant effect of such an addition, the trial court held that the joinder of a state party not amenable to suit in federal court under the Eleventh Amendment [1] destroyed its jurisdiction over

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[1] The trial court's conclusion that the DOTD could claim Eleventh Amendment immunity from suit brought against it in federal court by a private party is supported by the Supreme Court's position that "in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100, 104 S. Ct. 900, 908, 79 L.Ed.2d 67 (1984). In addition, the Fifth Circuit has repeatedly held that the DOTD may exercise such immunity from suit by private citizens in federal court. *See Fireman's Fund Ins. Co. v. Department of Transp.*, 792 F.2d 1373 (5th Cir. 1986); *Freimanis v. Sea-Land Serv., Inc.*, 654 F.2d 1155 (5th Cir. 1981). This federal immunity still exists, despite Louisiana state law rendering the DOTD amenable to suit in state court. "[A] state may waive its common law sovereign immunity under state law, without waiving its Eleventh Amendment immunity" to suit in a federal court." *In re Allied Signal, Inc.*, 919 F.2d 277, 280 n.4 (5th Cir. 1990). *See also Port Authority Trans-Hudson Corp. v. Feeney*, —— U.S. ——, ——, 110 S. Ct. 1868, 1872, 109 L.Ed.2d 264, 273 (1990).

the case. Within the same order, the trial court remanded the case back to state court.[2]

In its remand order, the trial court did not expressly cite the remand statute of 28 U.S.C. § 1447(c).[3] Instead, the trial court based its decision to send the case back to state court on two separate grounds. First, the joinder would destroy its subject matter jurisdiction, necessitating remand, and, second, the court believed that the suit "should be tried before one fact-finder due to the closely interrelated nature of the facts which form the basis of potential liability in this matter."

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[2] The trial court's order reads as follows:

> In preparing for trial in this matter, the court has reconsidered its decision denying Plaintiff's Motion for Leave of Court to Amend Petition and Remand. The court finds that Plaintiff's case against CSX Transportation, Marler Bennett, and the State of Louisiana through the Department of Transportation and Development (DOTD) should be tried before one fact-finder due to the closely interrelated nature of the facts which form the basis of potential liability in this matter.
>
> Fed. R. Civ. P. 15(a) governs amendments to pleadings, and this Rule specifies that "leave of court shall be freely given [to amend] when justice so requires." Since Plaintiff's proposed amendment would destroy subject matter jurisdiction in this court, the joinder is governed by 28 U.S.C. § 1447(e) . . . . Here, Plaintiff has a valid cause of action against the DOTD, and thus the purpose of the amendment is not to defeat federal jurisdiction . . . .

[3] *See* note 2, *supra*. 28 U.S.C. § 1447(c) (as amended) (Supp. 1990) provides:

> A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

Separating the Separable

As a preliminary matter, the appellee [sic] contends that the part of the trial court's order granting leave to amend and the part of the order remanding the case must be construed together. The Supreme Court, however, rejected this position in *Waco v. United States Fidelity & Guar. Co.*, 293 U.S. 140, 55 S. Ct. 6, 79 L.Ed. 244 (1934). *See also Mitchell v. Carlson*, 896 F.2d 128 (5th Cir. 1990). Like the present situation, *Waco* involved an appeal of a district court decree embodying several orders, including a remand order. The *Waco* Court determined that no appeal would lie from the order of remand, "but in logic and in fact the decree of dismissal preceded that of remand and was made by the District Court while it had control of the cause," *Waco*, 293 U.S. at 143, 55 S. Ct. at ——, 79 L.Ed. at ——. The court could review the decree of dismissal though it was unable to review the remand order. Here, the trial court issued the joinder and remand orders in a single decree. The order granting leave to amend to join the DOTD appeared first in the document, followed by the order remanding the case, both "in logic and in fact." Since the joinder of the DOTD provided the judge's mistaken impetus for remanding the case, we think it best to evaluate the appealability of each order separately.

Return to Sender?

As this issue will essentially determine the entire disposition of this case, we first consider the appellants' contention that the trial court erred in remanding the case to state court. However, to reach this issue, we must initially determine whether we may review it, either on appeal or by mandamus.

Reviewability of a remand order depends entirely upon the trial court's stated grounds for its decision to re-

mand. Remand after removal is controlled by § 1447(c),[4] which provides that "[i]f . . . it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . ." Through the prohibitory effect of 28 U.S.C. § 1447(d),[5] remand orders under § 1447(c) are not reviewable on appeal, by mandamus, or otherwise, except in civil rights cases. *See Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 97 S. Ct. 1439, 52 L.Ed.2d 1 (1977); *Volvo Corp. v. Schwarzer*, 429 U.S. 1331, 97 S. Ct. 284, 50 L.Ed.2d 273 (1976); *Mitchell*, 896 F.2d at 128. We feel it necessary to point out that the age-old touchstone language of § 1447(c), "removed improvidently and without jurisdiction," has been amended to read as provided above. The previous language, "improvidently and without jurisdiction," served as "magic words" in case law under the prior statute, the mere incantation of which rendered any remand order based thereon totally unreviewable, "no matter how clearly erroneous the order appear[ed] on its face." *In re Merrimack Mutual Fire Ins. Co.*, 587 F.2d 642, 648 (5th Cir. 1978); *see also Volvo Corp.*, 429 U.S. 1331, 97 S. Ct. at ——, 50 L.Ed.2d at 275; *Royal v. State Farm Fire & Casualty Co.*, 685 F.2d 124, 126 (5th Cir. 1982). We see no reason why the incantation of the new phrase, "lacks subject matter jurisdiction," should not have the same magical effect. *See* 28 U.S.C.A. § 1447(c) (as amended) and Commentary on 1988 Revision (Supp. 1990) (no substantive change).

In its remand order, the trial court never mentioned § 1447(c). However, it is clear from the trial court's

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[4] *See* note 3, *supra*.

[5] Once a case is remanded pursuant to § 1447(c), 1447(d) mandates that

> [a]n order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 [civil rights cases] of this title shall be reviewable by appeal or otherwise.

prior orders that it was aware of § 1447(c), as its order of November 1, 1989, declining to add the DOTD, specifically cites both the statute and its amended language verbatim. Oblivious to the amended language in § 1447(c), the appellants contend that we may review the remand order by mandamus because the trial court did not recite the magic words, "improvidently and without jurisdiction," when remanding the case. As we mention above, that language no longer exists, and while the appellants may still have some attachment to it, it is no longer the basis for remand. Still, the appellants argue that the failure to cite to § 1447(c) places this remand within the small class of cases that fall under the *Thermtron* exception to § 1447(c). *See Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 96 S. Ct. 584, 46 L.Ed.2d 542 (1976).

In *Thermtron*, the Supreme Court slightly enlarged reviewability of remand orders from the narrow constraints imposed by § 1447(d), holding that review is available by mandamus when remand is explicitly based upon grounds other than those specified in § 1447(c). *Thermtron*'s progeny, however, has construed this exception very narrowly. *See, e.g., Merrimack*, 587 F.2d at 647. Rather than extend this exception to any situation where a trial court, in the remand order, neither specifically recited the actual language of § 1447(c) verbatim nor mentioned the statute itself, "*Thermtron* announced only a narrow rule that was intended to be limited to the extreme facts of that case, in which a district judge stated openly that he was relying on a non-§ 1447(c) ground for remand." *Id. See also Soley v. First Nat'l Bank of Commerce*, 923 F.2d 406, —— (5th Cir. 1991) (holding that while the remand order was "confusing, we conclude that our decision in *Merrimack* precludes review of the remand order because the district court did not clearly and affirmatively state that it relied on a non-1447(c) ground"). Thus, even if the trial court neither states as grounds for remand the spe-

cific words of § 1447(c) nor cites the statute itself, the order is unreviewable if, by substantially similar language, it is evident that the court intends to remand for the grounds recited in § 1447(c).[6]

Such is the case here. Although the trial court neither quoted the actual language of § 1447(c) nor cited to the statute, the remand order provided that appellee's "amendment would destroy subject matter jurisdiction in this court." This ground comes literally within § 1447(c). Thus, we are precluded from reviewing the remand order on appeal, by mandamus, or otherwise. *See Merrimack*, 587 F.2d at 647-48.

This preclusion constrains us notwithstanding the fact that the trial court in remanding the case relied on a mistaken assumption—that after adding the DOTD it no longer had jurisdiction. The trial court determined that Tillman's amended petition "destroyed subject matter jurisdiction because the Eleventh Amendment prohibits suits by private citizens against the DOTD in federal court." While it is true that the Eleventh Amendment does create such a prohibition,[7] this prohibition did

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[6] *Compare In re Allied-Signal, Inc.*, 919 F.2d 277 (5th Cir. 1990) (granting writ of mandamus after noting that the trial court did not state that jurisdiction was lacking but affirmatively reflected that remand was based solely on a state statute) *with In re Weaver*, 610 F.2d 335, 337 (5th Cir. 1980) (denying writ of mandamus despite the absence of specific § 1447(c) words, when the district court based remand upon its belief that jurisdiction was lacking). *See also Merrimack*, 587 F.2d at 647-48 (holding that the district court's order, while not referring to § 1447(c) by number, stated one of its grounds, no jurisdiction, thereby precluding review by mandamus).

[7] The Eleventh Amendment states that: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." For application of Eleventh Amendment immunity to state agencies in federal court, see note 1, *supra*.

not deprive the trial court of jurisdiction in this case, as it is well established that the state may waive its Eleventh Amendment immunity by consenting to suit in federal court.[8] The DOTD's immunity has no effect upon the diversity jurisdiction already established between Tillman, CSX, and Bennett. There is absolutely no basis upon which the trial court could hold that the addition of a state agency that could exercise or waive its Eleventh Amendment immunity would destroy its established diversity jurisdiction over all parties.

Unfortunately for the appellants, like many before them, they may have won the battle, but lost the war. The Supreme Court has expressly held that a remand order based upon lack of jurisdiction, *even if clearly erroneous*, cannot be reviewed. *See Thermtron*, 423 U.S. at 343, 96 S. Ct. at 589, 46 L.Ed.2d at 549. In fact, in *In re Southwestern Bell Telephone Company*, 535 F.2d 859 (5th Cir.), *modified en banc*, 542 F.2d 297 (1976), *rev'd sub nom. Gravitt v. Southwestern Bell Tel. Co.*, 430 U.S. 723, 97 S .Ct. 1439, 52 L.Ed.2d 1 (1977), this court reviewed by mandamus a remand order on the ground that the district court had employed erroneous principles in determining that it no longer had jurisdiction. The Supreme Court pointed out the error of our ways in *Gravitt*, 431 U.S. at 724, 97 S. Ct. at 1440, 52 L.Ed.2d at 3, tersely holding that the district court's remand order "was plainly within the bounds of § 1447(c) and hence was unreviewable by the Court of Appeals, by mandamus or otherwise." That is the answer for this case without travelling down the mandamus road again.

Finally, the appellants' emphasis on the trial court's comment on the need to try the case before one fact-

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[8] *See, e.g., Port Authority*, —— U.S. at ——, 110 S. Ct. at ——, 109 L.Ed.2d at 272; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241, 105 S. Ct. 3142, ——, 87 L.Ed.2d 171, —— (1985). In certain cases, Congress has abrogated the States' sovereign immunity. *See, e.g., Dellmuth v. Muth*, 491 U.S. ——, 109 S. Ct. 2397, 105 L.Ed.2d 181 (1989).

finder, a non-§ 1447(c) basis for remand, is unavailing to bring the case within *Thermtron*. The trial court explicitly stated that the destruction of its jurisdiction served as one of its grounds for remand. This sufficiently cloaks the remand order in the § 1447(c) absolute immunity from review. *See Gravitt*, 430 U.S. at 723-24, 97 S. Ct. at 1439-40, 52 L.Ed.2d at 3; *Volvo Corp.*, 429 U.S. at 1333, 97 S. Ct. at 285, 50 L.Ed.2d at 275; *In re Weaver*, 610 F.2d at 337. Cases subsequent to *Thermtron* have been unwilling to extend *Thermtron* beyond the factual situation of that case, and we refuse to do so now. Whether right or wrong—indeed on the assumption that its premise for remand was wholly unfounded—the trial court remanded the case because the addition of the DOTD deprived the court of jurisdiction. This case therefore lies irretrievably in state court. Whatever the outcome of the chicken or the egg riddle of which came first, the allowance of the amendment or the remand order, our conclusion essentially renders review of whether the trial court abused its discretion by allowing the amendment a postmortem exercise.

Extra Postage

Regardless of this curious predicament, we turn now to the trial court's decision to allow joinder of the DOTD. If allowance of the amendment came first, the case at that moment was still ongoing. The DOTD, once added, could have waived its Eleventh Amendment immunity and remained as a party, or if it chose to exercise its immunity, the trial court could have dismissed it so it would no longer even be a party. The DOTD's temporary presence as a party would not have tainted or obliterated a classic case of diversity. Consequently, the grant of leave to amend was an unreviewable interlocutory order.[9]

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[9] Before an appellate court could review such an interlocutory order, it must have practical finality; meaning that the appellant was effectively out of federal court. *Moses H. Cone Memorial Hosp.*

Still, we feel it necessary to point out that the trial court's decision to allow joinder, while unreviewable, did not rise to the level of an abuse of discretion. Though the factual scenario seems complicated, the trial court certainly had § 1447(e) discretion to decide whether to allow joinder of the DOTD.[10] In allowing the joinder, the trial court correctly tempered its discretion with the standard established by *Hensgens v. Deere & Co.*, 833 F.2d 1179 (5th Cir. 1987), *appeal after remand*, 869 F.2d 879 (5th Cir. 1989),[11] finding that the plaintiff had a valid cause of action against the DOTD, so the principal purpose of the amendment was not to defeat federal jurisdiction. The court further considered the "other factors bearing on the equities," as required by *Hensgens*, and held that justice militated in favor, as the court described it, of trying the case before one fact-finder due to the closely interrelated nature of the operational facts in this railroad crossing case. Although at that moment the trial

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v. Mercury Constr. Corp., 460 U.S. 1, 10 n.8, 103 S. Ct. 927, 933 n.8, 74 L.Ed.2d 765, 766 n.8. As we have concluded, despite the trial court's mistaken assumption to the contrary, the case still resided in federal court after the addition of the DOTD.

[10] 28 U.S.C. § 1447(e) provides: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy . . . jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court."

[11] Though F. R. Civ. P. 15(a) provides that the court should give leave to amend freely when justice so requires, when such joinder would destroy subject matter jurisdiction

> justice requires that the district court consider a number of factors to balance the defendant's interests in maintaining the federal forum with the competing interests of not having parallel lawsuits. For example, the court should consider the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether plaintiff will be significantly injured if amendment is not allowed, and other factors bearing on the equities . . .

Hensgens, 833 F.2d at 1182.

court could have, in its discretion, denied permission to amend, its opposite ruling, even though based upon a mistaken conclusion, was not an abuse of its discretion.[12]

The Dust Settles

Consequently, having been erroneously remanded on § 1447(c) jurisdictional grounds, this case is irretrievably beyond anything we can do about it. We cannot review it by any means. We emphasize our complete inability to do anything about the trial court's joinder order, whether interlocutory or final, because what we cannot review we cannot by some juridical self-help get back to federal court.

While we point out that the trial court did not abuse its discretion in allowing joinder, this determination only provides extra postage. The mere presence of a § 1447(c) ground as one of the bases for the trial court's remand has returned this case to sender, without a forwarding address for federal jurisdiction.

For the reasons stated herein, the order granting appellee leave to amend, though not reviewable, was correct, and the correctness of remand is not reviewable even by mandamus.

Appeal Dismissed and Petition for Writ of Mandamus Denied.

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[12] To act within its discretion did not require the court to expressly contradict its previous holding that the DOTD was not an indispensable party. In *Hensgens* this court rejected such an argument, holding that "the balancing of these competing interests is not served by a rigid distinction of whether the proposed added party is an indispensable or permissive party." 833 F.2d at 1182 n.2.

MINUTE ENTRY
MCNAMARA, J.
NOVEMBER 1, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 88-4195

SECTION "D" (5)

DAVID E. TILLMAN

versus

CSX TRANSPORTATION CO., *et al.*

(Filed Nov. 2, 1989)

Before the court are the following Motions:

1. Motion of Plaintiff, David E. Tillman, for Leave of Court to Remand and Amend Petition, and
2. Motion of Defendants, CSX Transportation, Inc. and Marler L. Bennett, to Limit Jury Demand.

Both of these Motions are opposed by the adverse party. These Motions, set to be heard on Wednesday, November 1, 1989, are before the court on briefs, without oral argument. Each Motion shall be considered separately.

1. *Plaintiff's Motion for Leave of Court to Remand and Amend Petition.*

The Plaintiff seeks to join a non-diverse party to this litigation. Namely, Plaintiff seeks to add the Department of Transportation and Development for the State of Louisiana (the "DOTD"). Fed.R.Civ.P. 15(a) governs

amendments to pleadings, and this Rule specifies that "leave of court shall be freely given [to amend] when justice so requires." While this Rule is to be liberally construed, it is clear that "leave to amend should not be given automatically." *Chitimacha Tribe of Louisiana v. Harry T. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983). Moreover, an amended pleading naming a new non-diverse defendant in a removed case should be scrutinized more closely than an ordinary amendment. *Hensgens v. Deere & Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987), *appeal after remand*, 869 F.2d 879 (5th Cir. 1989).

The joinder of the DOTD in this matter would defeat diversity jurisdiction, and cause this court to remand these proceedings back to state court for lack of subject matter jurisdiction. Remand after removal is controlled by 28 U.S.C. §§ 1447(c) & (e) (West Supp. 1989). These sections state that the district court should remand a matter to state court if, at anytime before final judgment, the district court lacks subject matter jurisdiction. If a plaintiff seeks to join a non-diverse party after the case had been removed, however, a district court has the discretion to deny the joinder.

The *Hensgens* case controls joinder of a non-diverse party in the Fifth Circuit. The *Hensgens* court noted that when a plaintiff is seeking to add a non-diverse party which would defeat diversity jurisdiction,

> justice requires that the district court consider a number of factors to balance the defendant's interests in maintaining the federal forum with the competing interests of not having parallel lawsuits. For example, the court should consider the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether plaintiff will be significantly injured if amendment is not allowed, and any other factors bearing on the equities. . . . If it

> permits the amendments of the non-diverse defendant, it then must remand to the state court. If the amendment is not allowed, the federal court maintains jurisdiction. *Hensgens*, 833 F.2d at 1182.

Furthermore, a district court should consider whether the party sought to be joined is indispensable. *Depriest v. BASF Wyandotte Corp.*, 119 F.R.D. 639, 640 (M.D. La. 1988).

In this matter, the DOTD is clearly not an indispensable party. Plaintiff contends that the DOTD should be held jointly and severally liable with CSX Transportation, Inc. It is well settled, however, that joint tort feasors are not indispensable parties. *Nottingham v. General Communications Corp.*, 811 F.2d 873, 880 (5th Cir. 1987), *cert. denied*, 484 U.S. 854 (1987). Moreover, Plaintiff has been grossly dilatory in asking for this amendment. Plaintiff's Complaint was filed on August 29, 1988, and Defendants removed the case to federal court on September 22, 1988. The original trial date for this matter was June 5, 1989; the original cut-off date for amendments to pleadings was December 2, 1988. Plaintiff moved for and received a continuation of the trial date, and the court reset the trial for January 22, 1990; with a cut-off for amendments to pleadings of June 9, 1989. Plaintiff has had plenty of time to amend his pleading, and his failure to do so before June 9, 1989, is inexcusably dilatory.

Further, allowing Plaintiff to amend his pleading at such a late date will be prejudicial to Defendants. The trial is less than three months away, and the discovery cut-off date is December 11, 1989. The addition of the State of Louisiana as a Defendant will upset the trial date of January 22, 1990. Discovery will have to be reopened, and this will add tremendously to the cost of this litigation.

IT IS ORDERED that the Motion of Plaintiff, David E. Tillman, for Leave of Court to Remand and Amend Petition should be and is DENIED.

2. *DEFENDANTS, CSX TRANSPORTATION, INC. AND MARLER L. BENNETT, MOTION TO LIMIT JURY DEMAND.*

This Motion has been taken under advisement and will be decided by this court at a later date.

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MINUTE ENTRY
MCNAMARA, J.
NOVEMBER 30, 1989

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 88-4195

SECTION "D" (5)

DAVID E. TILLMAN

versus

MARLER L. BENNETT, *et al.*

(Filed Dec. 5, 1989)

Before the court is the Motion of Plaintiff, David E. Tillman, for Jury Trial and for Reconsideration of Motion to Amend and Remand. Defendants', CSX Transportation, Inc. and Bennett Marlow, oppose this Motion. The Motion, set to be heard on Wednesday, November 29, 1989, is before the court on briefs, without oral argument.

Having considered the memoranda of counsel and the applicable law;

IT IS ORDERED that Plaintiff's, David E. Tillman, Motion for Reconsideration of the Motion to Amend and Remand should be and is DENIED. As for Plaintiff's Motion for Jury Trial, the court's Minute Entry of November 29, 1989, renders Plaintiff's Motion MOOT in this regard.

* * * *

MINUTE ENTRY
MCNAMARA, J.
JANUARY 19, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 88-4195

SECTION "D" (5)

DAVID E. TILLMAN

versus

CSX TRANSPORTATION, INC. AND BENNETT MARLOW

(Filed Jan. 22, 1990; Date of Entry Jan. 23, 1990)

In preparing for trial in this matter, the court has reconsidered its decision denying Plaintiff's Motion for Leave of Court to Amend Petition and Remand. The court finds that Plaintiff's case against CSX Transportation, Bennett Marlow, and the State of Louisiana through the Department of Transportation and Development (DOTD) should be tried before one fact-finder due to the closely interrelated nature of the facts which form the basis of potential liability in this matter.

Fed. R. Civ. P. 15(a) governs amendments to pleadings, and this Rule specifies that "leave of court shall by freely given [to amend] when justice so requires." Since Plaintiff's proposed amendment would destroy subject matter jurisdiction in this court, the joinder is governed by 28 U.S.C.A. § 1447(e) (West Supp. 1989), which provides: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or *permit joinder and remand the action to the State court.*" (emphasis added).

The Fifth Circuit decision of *Hensgens v. Deere Co.*, 833 F.2d 1179, 1182 (5th Cir. 1987), *appeal after remand*, 869 F.2d 879 (5th Cir. 1989), sets forth the factors a district court should consider when deciding whether a plaintiff should be allowed to add a party whose joinder would destroy subject matter jurisdiction. The court noted that

> justice requires that the district court consider a number of factors to balance the defendant's interests in maintaining the federal forum with the competing interests of not having parallel lawsuits. For example, the court should consider the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether plaintiff has been dilatory in asking for amendment, whether plaintiff will be significantly injured if amendment is not allowed, and other factors bearing on the equities. . . . If it permits the amendment of the non-diverse defendant, it then must remand to the state court. *Id.* at 1182.

Here, Plaintiff has a valid cause of action against the DOTD, and thus the purpose of the amendment is not to defeat federal jurisdiction. Moreover, due to the closely interrelated nature of the facts which give rise to potential liability in this matter, the court finds that justice militates in favor of allowing the joinder so that Plaintiff can proceed before one fact-finder in this litigation.

Accordingly, the court's Minute Entry of November 3, 1989, denying Plaintiff's Motion for Leave of Court to Remand and Amend Petition, and the court's Minute Entry of December 5, 1989, denying Plaintiff's Motion for Reconsideration of the Motion to Amend and Remand are hereby set-aside. As such;

IT IS ORDERED that the Motion of Plaintiff, David E. Tillman, for Leave of Court to Remand and Amend Petition should be and is GRANTED, and this matter is hereby REMANDED to the Civil District Court for the Parish of Orleans, State of Louisiana.

* * * *

MINUTE ENTRY
MCNAMARA, J.
FEBRUARY 21, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

Civil Action No. 88-4195

SECTION "D" (5)

DAVID E. TILLMAN

versus

MARLER L. BENNETT, *et al.*

(Filed Feb. 22, 1990; Date of Entry Feb. 26, 1990)

Before the court is the Motion of Defendants, CSX Transportation, Inc. and Marler L. Bennett, for Reconsideration of Motion for Leave of Court to Amend Petition and Remand. Plaintiff, David E. Tillman, opposes this Motion. The Motion, set to be heard on Wednesday, February 21, 1990, is before the court on briefs, without oral argument.

This court, in a Minute Entry dated January 19, 1990, permitted Plaintiff to amend his petition to add the State of Louisiana through the Department of Transportation and Development (DOTD) as a Defendant in this matter. The court determined that this matter should be tried before one fact-finder due to the closely interrelated nature of the facts which form the basis of potential liability.

Joinder after removal is governed by 28 U.S.C.A. § 1447(e) (West Supp. 1989), which provides: "If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or *permit joinder and re-*

mand the action to the State court." (emphasis added). Plaintiff's amended petition destroyed subject matter jurisdiction because the Eleventh Amendment prohibits suits by private citizens against the DOTD in federal court. As such, the court remanded this suit to the State court.

Defendants argue that since the Eleventh Amendment prohibits suits by private parties against the State in federal court, this court should have denied the Plaintiff's Motion to Amend and Remand. This argument is fallacious since § 1447(e) explicitly states that a district court, after removal, can permit joinder of a party who destroys subject matter jurisdiction and then remand the action to the State court. It does not matter whether the joined pary is a non-diverse party or is barred from federal court by the Eleventh Amendment. As long as the additional party would destroy subject matter jurisdiction, a district court has the authority to permit the joinder and then remand the action to the State court. Accordingly;

IT IS ORDERED that Defendants', CSX Transportation, Inc. and Marler L. Bennett, Motion for Reconsideration of Motion for Leave of Court to Amend Petition and Remand should be and is DENIED.

* * * *

STATUTORY PROVISIONS AND RULE INVOLVED

Title 28 U.S.C., Section 1332, provided in pertinent part:

> **§ 1332. Diversity of Citizenship; amount in controversy; costs**
>
> (a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States
>
> * * * *
>
> (c) For the purposes of this section and section 1441 of this title—
>
> (1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business . . . .

Title 28 U.S.C., Section 1441(a) provides:

> **§ 1441. Actions removable generally**
>
> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending. For purposes of removal under this chapter, the citizenship of defendants sued under fictitious names shall be disregarded.

Title 28 U.S.C., Section 1447 provides in pertinent part:

§ 1447. Procedure after removal generally

* * * *

(c) A motion to remand the case on the basis of any defect in removal procedure must be made within 30 days after the filing of the notice of removal under section 1446(a). If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. An order remanding the case may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal. A certified copy of the order of remand shall be mailed by the clerk to the clerk of the State court. The State court may thereupon proceed with such case.

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

(e) If after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court.

Fed. R.Civ.P. 15(a) provides:

Rule 15. Amended and Supplemental Pleadings.

(a) Amendments. A party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any

time within 20 days after it is served. Otherwise a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.